UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
Case No. 08-13555 (JMP)
ADV No. 08-01420 (JMP)
- -x
In the Matter of:
LEHMAN BROTHERS HOLDINGS INC., ET AL.,
Debtors.
- -x
SECURITIES INVESTOR PROTECTION CORPORATION, ET AL.
Plaintiffs.
-against-
LEHMAN BROTHERS INC.
Defendant.
- -x
United States Bankruptcy Court
One Bowling Green
New York, New York
February 15, 2012
10:04 AM

B E F O R E:
HON. JAMES M. PECK
U.S. BANKRUPTCY JUDGE

1. Motion of the Debtors and the Committee for Approval of the Settlement Transaction Resolving the Two Hundred Twenty-Ninth Omnibus Objection to JPMorgan's Asset Management Fund Claims (No Liability, Misclassified and Duplicative Claims) [ECF No. 2485]

2. Motion Pursuant to Section 8.4 of the Modified Third Amended Joint Chapter 11 Plan of Lehman Brothers Holdings Inc. and Its Affiliated Debtors and Sections 105(a), 502(c) and 1142(b) of the Bankruptcy Code to Estimate the Amounts of Claims Filed by Indenture Trustees on Behalf of Issuers of Residential Mortgage-Backed Securities for Purposes of Establishing Reserves [ECF No. 24254]

In Re Lehman Brothers Australia Limited [Case No. 12-10063]
3. Hearing to Consider Granting Relief Requested in the Chapter 15 Petition and the Verified Petition for Recognition of Foreign Proceeding

Matters to be Heard at 2:00 P.M.
4. Margaret Bennett v. Lehman Brothers Holdings Inc. [Adversary Case No. 10-03264] Pre-Trial Conference

5. Turnberry Centra Sub, LLC, et al. v. Lehman Brothers Holdings Inc. [Adversary Case No. 09-01062] Motion to Dismiss Plaintiffs' Amended Complaint

6. Lehman Brothers Holdings Inc. v. Fountainbleau Resorts, LLC, et al. [Adversary Case No. 10-02821] Motion to Dismiss Defendants' Amended Counterclaims

7. Lehman Brothers Holdings Inc. v. Fountainbleau Resorts, LLC, et al. [Adversary Case No. 10-02823] Motion to Dismiss Defendants' Amended Counterclaims

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MARCUS AYRES, Lehman Brothers Australia Limited

P R O C E E D I N G S

THE COURT: Mr. Perez --

MR. PEREZ: Good morning, Your Honor. Alfredo Perez.

THE COURT: -- good morning.

MR. PEREZ: Mr. Harrison's handling the first matter.

MR. HARRISON: Good morning, Your Honor.

THE COURT: Good morning.

MR. HARRISON: If it pleases the Court, Lyn Harrison of Curtis, Mallet-Prevost, Colt & Mosle, counsel for the debtors.

Your Honor, this is the hearing on the motion of the debtors and the creditors committee for approval of the settlement transaction resolving the 229th omnibus objection to JPMorgan's asset management funds claims. Your Honor, on February 1st, 2012, this Court entered an order to show cause in connection with this motion. The order to show cause permitted the motion to be carried on an expedited basis, and we thank you, Your Honor, for your consideration and the calendar time.

Your Honor, by way of background, the 129th omnibus objection challenged the purported right of certain investment funds that received investment advice or other services from subsidiaries of JPMorgan and Company to fully satisfies their claims using collateral JPMorgan received from LBHI the week before its bankruptcy. JPMorgan applied over 700 million

dollars to the fund claims based upon certain agreements entered into in September of 2008.

Your Honor, JPMorgan took the position that it could apply this collateral on behalf of the funds because the funds were purportedly affiliates of JPMorgan Bank, as that term is used in the September agreements. Your Honor, as this Court is aware, the validity of the September agreements is presently being challenged in the adversary proceeding commenced by LBHI and the committee against JPMorgan Chase Bank, N.A. However, in the 229th omnibus objection, it was the movants' position that even if the September agreements were valid it was an extreme overreach for JPMorgan Bank to attempt to cover losses borne by its investment funds under the color of such agreements; losses, Your Honor, relating to, for example, subordinated debt and prime mortgage.

Your Honor, for the reasons -- for those reasons, Your Honor, on October 26th, 2011, the debtors and the committee filed the Lehman Brothers Holdings Inc. and the creditors committee's 229th omnibus objection to the asset management fund claims, where it was argued that the term "affiliate" should be given its plain and ordinary meaning and that the funds were not affiliates of JPMorgan Bank based on the fund documents and other factors considered by the courts in ascertaining whether an entity is an affiliate.

Your Honor, movants also argued that the losses to the

funds were really borne by JPMorgan's customers, not by the bank or anyone in its corporate family. In mid-December, 2011, Your Honor, the JPMorgan funds responded to the claims objection. And I believe, Your Honor, in early January of 2012 the parties began to engage in negotiations to see if there was a basis for a settlement with respect to the application of the LBHI cash collateral to satisfy the funds claims.

Your Honor, thereafter the LBHI and the committee filed a reply at which time discussions began in earnest to try to resolve the claims objection. Your Honor, today, the movants seek approval of a settlement transaction that resolves the movants' claims objection contesting the purported rights of the funds to fully satisfy their claims using the collateral JPMorgan Bank required LBHI to post before its bankruptcy; collateral which has been in the possession of JPMorgan and thus unavailable to the estate since prior to LBHI's bankruptcy petition.

Your Honor, the movants believe that the settlement transaction is commercially reasonable -- a commercially reasonably resolution of the claims objection because the overall value to LBHI is approximately ninety-eight percent of the amount in dispute. To be clear, Your Honor, the estate believes that it would eventually succeed on the claims objection. However, given the present value of today's settlement, the total dollar recovery that the estate will

receive at this time in connection with the settlement exceeds the value that the estate could have received if the litigation went to conclusion and the movants were to succeed.

Moreover, Your Honor, the estate creditors will be benefited by the settlement in the near term since the funds being returned to LBHI will be available for the first distribution to creditors. Of course, the settlement transaction will also benefit the estate by avoiding the cost, delay and litigation risk associated with having to prosecute the issues raised in the claims objection.

Your Honor, as set forth in more detail in the motion, the settlement agreement and the related documents in support of the motion provide, among other things, the return of approximately 699 million dollars to LBHI that had previously been provisionally allocated to satisfy the claims filed by the funds pursuant to the collateral disposition agreement or the CDA.

And Your Honor, if I could just digress for a second, if you recall, Your Honor, pursuant to the collateral -- Your Honor, pursuant to the collateral disposition agreement, which was approved back in March of 2010, certain cash was provisionally applied to the claims of JPMorgan and its related entities, including the JPMorgan funds. For this reason, the settlement agreement not only contemplates the disallowance and reclassification of claims, but also results in cash coming

back to the LBHI estate. In essence, Your Honor, the settlement agreement provides for an unwinding of the CDA as to the claims filed by the JPMorgan funds.

For us, the settlement agreement further provides, Your Honor, the funds will retain fifteen million dollars of the collateral posted under the CDA in respect to the funds claims and any interest earned on the collateral posted for the benefit of the funds claims. The retained cash of any interest earned on the cash, Your Honor, will not be subject to any disgorgement or defeasance. And the funds shall be freed to allocate the retained cash and interest among one another. And the funds claims that were assigned to LBHI under the CDA will be reassigned to the funds free and clear of any adverse claims created by or through LBHI.

Your Honor, the additional benefits to the estate include the following: the other JPMorgan entities that are parties to the CDA will waive their rights to the reallocation of the 699 million returned to LBHI and the retained cash. The funds will also waive a claim for a supplemental 12.5 million dollar payment under the CDA based upon the reversal of a cross-affiliate setoff under certain derivative contracts. LBHI and the funds shall exchange mutual releases relating to the transaction under the September agreements and the CDA, and the funds will agree to waive any claim asserted against LBHI based on any corporate board resolution guarantee or Standard &

Poor's guarantee issued by LBHI.

Your Honor, the movants believe that the settlement agreement is a reasonable resolution of the claim objection because the overall value to LBHI is approximately 711.7 million dollars, which is comprised by the fund's waiver of the -- of a 12.5 million dollar claim and a return to LBHI's estate of 692 million dollars, approximately, in cash. Again, the immediate return of the cash to LBHI will not be tied up or in any way restricted by the terms and conditions of the collateral disposition agreement. Thus, the settlement agreement is highly beneficial to the estate, particularly at this point when the debtors are anticipating making their first distribution under the confirmed plan.

Your Honor, in support of the motion the movants have submitted the declaration of Philip Kruse, a managing director of Alvarez & Marsal. Mr. Kruse is in the courtroom today if Your Honor had any questions regarding the business judgment utilized in bringing this settlement to fruition. Your Honor, I will note for the record that there have been no objections filed or received in connection with the motion. Thus, Your Honor, the estate believes that the movants have met the criteria established in this circuit under Bankruptcy Rule 9019, and the settlement does not fall below the lowest point in the res reasonableness.

Accordingly, Your Honor, the debtors request the Court

enter an order approving this settlement. Your Honor, I believe my colleague, Erica Taggart, has comments on behalf of the committee, unless Your Honor has any questions.

THE COURT: I have no questions.

MS. TAGGART: Good morning, Your Honor. Erica Taggart, from Quinn Emanuel, on behalf of the official committee of unsecured creditors of Lehmans (sic) Holdings.

The committee also supports this settlement. We've been working closely with the estate in this claim objection, as with all matters involving JPMorgan. The committee co-authored the claim objection and has participated in the settlement negotiations with the funds. Although we believe the claim objection has substantial merit, we agree that the settlement is a fair resolution in the best interests of the creditors for the reasons Mr. Harrison just explained and as also described in Mr. Kruse's declaration, including that it amounts to a ninety-eight percent recovery of the money that was allocated to this claim.

Accordingly, the committee joins the estate in recommending approval of the settlement.

THE COURT: Fine. Is there anyone else who wishes to be heard?

MR. SMITH: Good morning, Your Honor. Edwin Smith, Bingham, McCutchen, for the JMP Funds.

Of course, there's value for the JPM Funds. They're

getting their claims back in addition to retaining some of the cash, although ninety-eight percent is going to the estate. But we're pleased to have reached this settlement, Your Honor. Thank you.

THE COURT: I'm pleased that you reached it as well.

Mr. Novikoff?

MR. NOVIKOFF: Good morning, Your Honor. Harold Novikoff, Wachtell, Lipton, Rosen & Katz, on behalf of JPMorgan Chase Bank, N.A. and a number of its subsidiaries.

I just wanted to mention in two elements of the transaction that Mr. Harrison did not mention in his summary. They are in the papers that were filed with the Court. I just want to make sure Your Honor is aware and they're on the record of this hearing.

One is that the settlement does not affect the claims of JPMorgan Chase Bank and its other subsidiaries other than these investment funds against the Lehman estate or -- not does it affect the defenses of Lehman with respect to those matters. Also, this contemplates that Lehman will discontinue its pursuit against JPMorgan Chase Bank of the money that the estate's getting back, the 699 million, as well as the 15 million that it's agreed that the funds can retain.

I don't necessarily agree with the characterization of all of the transactions by Mr. Harrison, but I don't think it benefits anybody to go through all those disagreements right

now.

THE COURT: I agree it doesn't anybody.

MR. SMITH: Okay. Thank you, Your Honor.

THE COURT: Is there anything more?

MR. PEREZ: No, Your Honor.

THE COURT: This is an uncontested 9019 motion to settle a very significant claim, and the benefits are obvious and manifest. And regardless of the manner in which Mr. Harrison has characterized the settlement, the papers speak for themselves. I've reviewed the filing of the settlement agreement on the docket as well as Mr. Kruse's declaration and considered the statements of counsel. This is approved, and we can move on to the next item.

MR. PEREZ: Your Honor --

THE COURT: If anyone wishes to be excused as a result of this approval, you're free to go.

MR. PEREZ: -- Your Honor, can I approach the bench with the order? Thank you --

THE COURT: Please.

MR. PEREZ: -- very much.

IN UNISON: Thank you, Your Honor.

THE COURT: Let's just take a moment to allow people to move about the courtroom.

MR. PEREZ: Good morning, Your Honor. Alfredo Perez, on behalf of the debtors.

Your Honor, the next matter is basically a status conference. It'll be very brief, Your Honor, with respect to our estimation motion on the RMBS trustee. Your Honor, I'm happy to report that I believe we have reached a settlement --

THE COURT: That's great.

MR. PEREZ: -- with the RMBS trustee. The -- there -- it's in the process of being vetted, so we -- what we would like to do is continue this hearing until the 22nd and hopefully we'll be in a position to present an order at that time. We're not quite there yet, but I think that we're well on our way to being there. Counsel for some of the trustees here, not all of them. And that's basically the report that we have on the record.

THE COURT: Okay. And -- so it's clear, and without disclosing anything that isn't yet ripe for public disclosure, is it contemplated that the settlement that you believe you have reached in principle will permit a distribution to take place with a reserve that is acceptable to all parties?

MR. PEREZ: That's exactly correct, Your Honor. And it --

THE COURT: That's --

MR. PEREZ: -- has some other bells and whistles, but that's exactly correct.

THE COURT: Okay.

MR. PEREZ: And we're hoping to have it by the 22nd.

THE COURT: Great.

MR. PEREZ: Thank you, Your Honor. I believe --

THE COURT: Good luck in getting --

MR. PEREZ: -- the last matter on the agenda is the LB Australian.

THE COURT: Fine. Good luck in getting that done. Is there any other attorney representing a trustee or any party-in-interest in connection with the matter just described by Mr. Perez who wishes to be heard?

UNIDENTIFIED SPEAKER: Thank you, Your Honor. Bill Vinn (ph.), on behalf of Wilmington Trust.

We have of course about five different trustees involved in this thing. They have basically given me the authority since we only view this as a status conference to speak on behalf of all. In essence, Your Honor, the way it has to work out, because we have to give notice out to the beneficial holders, to see if -- it's kind of setting out the proposed agreement with the debtors and see if we get any direction contrary to entering into such a settlement. And just for the Court's information, all responses from the various beneficial holders is due by this Friday, the 17th.

So we will know clearly by the 22nd what kind of responses, if any, we've gotten from the beneficial holders. And then, the trustees will then be in a position hopefully to go ahead and finalize the agreement. And as you indicated, and

LEHMAN BROTHERS HOLDINGS INC., ET AL.

as agreed there, it will set a specific reserve amount which will then allow the debtors to make the initial distribution. Thank you, Your Honor.

THE COURT: Okay. Thank you, Mr. Vinn.

Anyone else? Okay. We'll move on to LB Australia. For some reason that microphone is acting up today. I think it needs to be screwed in to its base.

MR. SELIGMAN: Thank you.

THE COURT: Mr. Perez seems to be the handy man.

MR. SELIGMAN: I just call the handy man. Good morning, Your Honor. David Seligman, on behalf of the Australian liquidators.

We're here this morning, Your Honor, on a petition for recognition of the -- of Lehman Brothers Australia Limited liquidation proceedings in Australia as well as recognition of Mr. Steven Parberry (ph.) and Marcus Ayres as the foreign representatives. Your Honor, there have been no objections to this petition. I'd like to give Your Honor a little bit of background, if I may. I did also want to state, Your Honor, that in support of the petition we did file a number of pieces of paper; a declaration of Mr. Ayres in support of the petition. That was docket number 2 in this matter; declaration of Mr. Ayres pursuant to Section 11 U.S.C. 1515 with respect to service. That was docket number 3, and the debtor did also file and serve the notice of commencement of the Chapter 15

proceedings on all the parties required to be served under Rule 2002(q).

Your Honor, the Australian liquidation proceeding has been pending for quite some time in Australia. We thought it was appropriate now to come before Your Honor with the Chapter 15, and I'm going to get into that in just a moment. I did want to just, as background, Your Honor, state that the Lehman Australia proceeding has its roots dating back to September 26th, 2008 when the board of directors of Lehman Brothers Australia concluded that Lehman Brothers Australia, which I'll refer to as LBA, was or was likely to become insolvent. And as a consequence of that, the board appointed originally Mr. Parberry and another gentleman, Mr. Singleton, as administrators of the -- of LBA in that role.

As voluntary administrators, they did originally work to negotiate a deed of company arrangement with various to the stakeholders. That was ultimately not approved by the Australia court. And as a result of that, in October of 2009 Mr. Parberry and Mr. Singleton were appointed as liquidators by the Australia court of LBA. Subsequently, in 2011 Mr. Singleton was replaced by Mr. Ayres in an administrative manner -- as administrative manner as liquidator.

The -- we've laid out the assets and liabilities of LBA in the pet -- in our papers. Essentially, the assets of LBA are cash on hand, some interests in collateralized debt

obligations with respect to the whole Dante (ph.) matter and various claims that exist in the Chapter 11 proceeding as well as others. And we've laid out the various claims that have been lodged in the Lehman Brothers Australia petition as well.

Your Honor, the -- as we mentioned when we were before you last time, the reason for the Chapter 11 -- for the Chapter 15 filing was coincidental all the other matters that we've been appearing in front of Your Honor to date. The reason for the Chapter 15 now was we knew at some point we were going to have come before Your Honor and seek a Chapter 15 because ultimately the proceedings in Australia were going to have to be wound up and we were kind of waiting for the right moment.

There -- the reason now is because one claim that Lehman Brothers Australia had is a claim under certain insurance policies. And they have been in communication with their insurers and at most, if not all, of the -- those -- of these sets of insurers happened to be located in the United States. The parties have been in discussions for quite a long period of time involving a number of insurance coverage matters.

THE COURT: What kinds of policies are these? Are these DNO type policies?

MR. SELIGMAN: Yes, Your Honor. They're actually investment management insurance policies. They actually relate -- as we said in the papers, a number of claims have

been asserted against LBA with respect, I guess you can call it, the mismanagement or wrongful advice with respect a number of investment accounts. And these are basically insurance claims that would cover that kind of liability. And so, there's basically been discussions between LBA and this group of insurers for quite some period of time to see if they can resolve those matters.

We're pleased that after actually engaging in mediation for quite some period of time we did -- we have reached a settlement in principle on that. In order to effectuate that settlement and release, it is going to require that there be a partial scheme of arrangement in Australia, which I guess I can describe as sort of a mini plan or reorganization in Australia to effectuate that settlement.

Another condition for that -- of the settlement is going to ultimately be that there was -- that the insurers wanted an order authorizing LBA to enter into that settlement here in the United States. And so, that was -- those were sort of the two principle reasons why we felt now was the right time rather than waiting until the end of the Chapter 15 proceedings to get a Chapter 15 -- we thought it was appropriate to come in now because we knew that we were going to have to get a partial scheme of arrangement, which was going to ultimately need some recognition as well as a requirement that there be some kind of approval here in the United States because there could be

LEHMAN BROTHERS HOLDINGS INC., ET AL.

issues about whether these are claims that reside in the United States or not.

But in order to effectuate that settlement, that's -- was one of the conditions to the settlement. So we're not asking for approval of anything today. We just wanted to set that as background. We'll ultimately have to come back to Your Honor once we get all the various approvals for that, but we at least wanted to give Your Honor that context or that was the reason for --

THE COURT: I appreciate that. Just --

MR. SELIGMAN: -- the Chapter 15 now.

THE COURT: -- just a question or two about what you've just said. You used the term "scheme of arrangement," which I often associate with an insurance scheme. Often in the U.K. and in Chapter 15 practice, we occasionally are involved in recognition of foreign insurance schemes involving a runoff of a company. I gather that's not what you're referring to here, or is it?

MR. SELIGMAN: No, we're talking about a scheme of arrangement in the -- I guess the insolvency con -- not the insurance context, but the --

THE COURT: You're talking about a --

MR. SELIGMAN: -- insolvency --

THE COURT: -- scheme of arrangement as another way of saying a plan of reorganization if it were in the United

States?

MR. SELIGMAN: Yes, that's correct, yes. That's correct, Your Honor.

THE COURT: And is that scheme of arrangement to be developed within the LBA case in Australia?

MR. SELIGMAN: Yes.

THE COURT: Okay. So it's not a separate proceeding that you're talking about?

MR. SELIGMAN: No. It would be in that context -- and I'm not an expert in the Australian reorganization procedures. but that's my understanding is, is that that would be something that would be brought to the creditors in Australia and then ultimately brought to the Court in Australia but in connection with the pending proceedings that currently exist in the Chap -- in the --

THE COURT: So --

MR. SELIGMAN: -- in Australia.

THE COURT: -- just to talk about this in the broadest outline, you have an agreement in principle with a group of insurers that presumably will produce a fund that will be available for distribution within the LBA proceeding and that in order to obtain approval of the settlement that will produce this fund two things need to happen, at least.

one is you need to go through some process in Australia in which creditors get a chance to approve the

settlement and presumable Justice Peter Jacobson and -- of the federal court in Australia will be asked to approve that. And more or less simultaneously with that approval in Australia, you'll be seeking approval from the bankruptcy court here of a settlement within the confines of the Chapter 15 case as additional comfort to the insurers. Do I understand it correctly?

MR. SELIGMAN: That's my understanding, yes, Your Honor.

THE COURT: Okay.

MR. SELIGMAN: Your Honor, with that background as to the merits of the petition, we have laid out what we think are the grounds to justify recognition under Chapter 15. We believe we satisfied all the elements that principally that the Australia proceeding is a foreign proceeding, that the -- that Mr. Ayres and Mr. Parberry are appropriate foreign representatives as defined in the statute. And then, finally, the Australian proceeding is actually a foreign main proceeding and the COMI of that proceeding and of LBA is in Australia.

We would also note that separate from all this we have separately obtained a Chapter 15 in the U.K. recognizing the Chapter -- recognizing the LBA proceedings as well. That was back in the fall. And so, Your Honor, unless Your Honor has any questions, we would submit that it -- we believe we've satisfied all the elements for recognition to a Chapter 15 and

we would request Your Honor grant our petition requesting recognition.

THE COURT: I'm prepared to do that. But before confirming that on the record, I'll simply ask if there's any party-in-interest who wishes to be heard on this question.

There's no respon -- well -- wait a --

MR. PEREZ: Not on behalf of the estate, Your Honor.

THE COURT: Okay. Who said -- an exciting moment there when Mr. Perez was standing up. It's obviously that this is uncontested and consistent with Chapter 15 practice. And based upon the representations made that this is a Chapter 15 that will, among other things, facilitate an important settlement with a group of unnamed insurers, this is approved. And I will entertain an appropriate order.

MR. SELIGMAN: Thank you, Your Honor. May I approach with an order?

THE COURT: Yes.

MR. SELIGMAN: Okay. Thank you, Your Honor.

THE COURT: Thank you. Now, that --

MR. PEREZ: I don't believe there any other matters.

THE COURT: -- that ends the morning calendar. I was advised through my chambers that there had been a request for a chambers conference to take place at the conclusion of the morning calendar, but it's not at all clear to me who needs to be in attendance at that.

MR. PEREZ: Your Honor, it would be counsel for the RNBS trustees, counsel for the committee and myself.

THE COURT: Okay. Well, let's clear the courtroom and maybe we'll have a conference here.

(Recess from 10:33 a.m. until 2:00 p.m.)

THE COURT: Be seated, please. Good afternoon. The first matter is Bennett v. Lehman.

MR. FISCHBARG: Yes, Judge. Your Honor --

THE COURT: Let's proceed.

MR. FISCHBARG: Judge --

THE COURT: Why isn't this settled?

MR. FISCHBARG: Well, we made an offer lower than the --

THE COURT: Excuse me?

MR. FISCHBARG: This is the amount sued for was the sum served of 142,000, and we did offer --

THE COURT: Can you identify yourself for the record, please?

MR. FISCHBARG: Sorry. My name is Gabriel Fischbarg for the plaintiff, Margaret Bennett.

THE COURT: This is an incredibly small matter to be taking this long, and I don't understand what's wrong with counsel, frankly.

MR. FISCHBARG: So --

THE COURT: Because I think good counsel would have

had this settled a while ago.

MR. FISCHBARG: Right. So what I was saying was -- I'm sorry -- is that that it's for a sum served of 142,000. We did make an offer less than that amount. We have not really heard a counterclaim that's much lower of the nominal nature, so we haven't -- the sides are far apart. And we haven't heard anything since.

THE COURT: Why isn't this being result?

MR. HOLTZMAN: Your Honor, Robert Holtzman from Kramer Levin for the estate.

We did make an offer. We made an initial offer shortly after the adversarial proceeding was filed in June of 2010. The response at that time was that plaintiff would not accept a settlement of less than the amount sought on the complaint, which put a stop to discussions at that time.

Five months later, they did reduce their demand very, very slightly, but only marginally; about ten percent or so off of the amount demanded. And that's why we haven't had any reasonable discussions. The estate does prepare -- does stand prepared to engage in reasonable settlement negotiations, but we haven't seen any movement in that direction.

THE COURT: This isn't a personal injury case. There are either good defenses or there aren't. Are there good defenses?

MR. HOLTZMAN: We believe there are, Your Honor, yes.

THE COURT: And what are they?

MR. HOLTZMAN: This is a breach of contract case; a post-petition employee who's claiming that she was terminated without cause.

THE COURT: Right.

MR. HOLTZMAN: And as a result, would be entitled to continued payment of her base salary, severance and a pro rate bonus. We believe she was in fact terminated for cause. She was warned in advance of her termination for various incidents of her engaging in insubordinate behavior, not what doing what her managers asked for her. And as a result, she falls within the definition of cause in the contract, which is a substantial and continuing failure to perform her employment duties or obligation satisfactorily.

That's why she was terminated. It was a cause termination, so she's not entitled to recovery.

THE COURT: Is the case trial ready?

MR. HOLTZMAN: We're completed with discovery. Yes, it is, Your Honor.

MR. FISCHBARG: Yes.

THE COURT: Either you settle the case or we'll have an early trial date.

MR. FISCHBARG: Okay.

THE COURT: Is there anything more that needs to be done between now and a trial?

LEHMAN BROTHERS HOLDINGS INC., ET AL.

MR. HOLTZMAN: No, Your Honor.

MR. FISCHBARG: No.

THE COURT: Has there been any consideration in mediation?

MR. HOLTZMAN: We offered that early on. It was rejected by the plaintiff.

MR. FISCHBARG: Well, I think it wasn't rejected. It was -- we were waiting -- there was no -- I think they wanted to send it to JAMS mediation, but the plaintiff couldn't -- wasn't going to afford half the cost of that. So if they're willing to come up with some mediation in the courthouse, one of the judges might -- we -- the idea was -- we were floating the idea maybe another judge might be able to listen to the case as a mediator, as is done in other federal courthouses. And so, that was the status of that. But yeah, the plaintiff is ready to mediate it if nec -- at any time with a neutral party that's -- that there's no expense.

THE COURT: I mean, this -- and I mean no disparagement in saying this; is one of the very few examples of pending litigation in the context of Lehman Brothers that appears to be a nuisance lawsuit in the sense that the amounts are not great. It has been pending for a very long time. There have been several repeated discovery conferences relating to the scope of electronic discovery; some as long ago as maybe a year ago, with what I can only conclude appears to be

unreasonable behavior on the part of plaintiff's counsel. And I mean no disrespect in saying that.

But this is a case that I believe if professionally handled would have been resolved a while ago. I strongly suggest that the parties endeavor to reach a reasonable compromise of this litigation. And if not, we'll suggest that we schedule a trial date within the next sixty days. How much time will be required for trial?

MR. FISCHBARG: I anticipate two or three days at the most.

MR. HOLTZMAN: I would agree with that, Your Honor.

THE COURT: And why will it take as long as even two days? Why isn't this something that can be tried in an afternoon?

MR. FISCHBARG: It's possible. But if plaintiff presents their case, and then defendant has to present their case, and then there might be rebuttal. I was -- that's -- I was thinking three stages, and each stage probably takes half a day. So if --

THE COURT: What's the evidence that's required at trial?

MR. FISCHBARG: The evidence? I guess there's the work case. There's some e-mails and correspondence. I guess they built up a case file against -- in human resources, they built up a case file against the plaintiff to justify the

termination, so that's part of the evidence. And mostly, e-mails and correspondence and some Excel spreadsheets showing the work that they say she didn't do, which she did do. So I guess the total amount of evidence might be twenty marked items, I think.

MR. HOLTZMAN: Your Honor, there's a limited number of documents that would be necessary on behalf of the estate, her direct manager and his manager, who both participated in the decision making process, would testify and short testimony from an HR person.

THE COURT: Well, it seems to me that if it's going to have to go to trial the parties should endeavor to make it a one-day trial. Just given the cost of going forward, both parties should see value in limiting their proof so as not to make this a ridiculously expensive proposition for either side. So I have what I suppose are two strong suggestions at this juncture.

One is for everybody to get serious about looking at their cases realistically, including an evaluation that's dispassionate as to the risks associated with whatever may be in the files that you have seen. And since I haven't seen that information, I make no judgment one way or the other as to whether there is or is not a good defense. But somebody should be able to assess that risk.

Secondly, if you're unable to reach a settlement, and

I'm not proposing mediation because frankly the amounts involved here are simply too inconsequential to even justify mediation, that you work on a streamlined time to trial in which the trial will not last more than one trial day and that for purposes of moving this along you get a date from my courtroom deputy now for that trial approximately sixty days from today.

MR. HOLTZMAN: Thank you, Your Honor.

MR. FISCHBARG: Okay.

THE COURT: And good luck in getting this done.

MR. FISCHBARG: All right, thank you.

THE COURT: The next is the Turnberry, Fontainebleau matter.

MR. MCCARTHY: Good afternoon, Your Honor. My name's Ed McCarthy. I'm here with Lauren Zerbinopoulos, from Weil Gotshal, on behalf of the lenders in these transactions, LBHI. We're also here on behalf of a third party to these transactions, Lehman Bank, who's a named defendant in the Town Square adversary.

THE COURT: Okay.

MR. MCCARTHY: We have a few client reps with us here; Joelle Halprin (ph.) and Chad DeMartino (ph.). We're here on my clients' motion to dismiss in three separate adversaries. That's the two Fountainebleau adversaries, 102821 and 2823, and the Town Square adversary, 0910062.

In about twenty minutes I'd like to make three points, if I can, Your Honor. First I want to describe these deals and the cases because there are important differences in the cases. Second --

THE COURT: Although the papers look almost identical.

MR. MCCARTHY: And that's -- you're absolutely right, Your Honor, because the papers focus on the fraud claim. And that's what I want to spend my time talking about today.

THE COURT: Okay.

MR. MCCARTHY: The fraud claim is the same in each of the cases, and I wanted to try to help simply why that claim fails at law. I'd like to talk about what's left too. Assuming we can dismiss these farfetched fraud claims, where does that leave us in this litigation? Your Honor, there are differences in these cases. You have the two Fountainebleau cases, which relate to a deal regarding the Fountainebleau Resort and Casino, which has since been sold. And then, you have the Town Square case, which relates to a shopping mall, and the retail portion of that mall in Nevada is the collateral for that deal.

On one side of each of these cases, LBHI is the lender. Other than that, we have different parties, different properties, different loan documents, different timing and different claims. For the Fountainebleau Resort, there was originally a mezzanine loan that was funded in June 2007, fully

funded for eighty-five million by Lehman Brothers Bank. None of it's been repaid. And Lehman Brothers LBHI with its co-lenders also funded 163 million, approximately, of a 315 million dollar loan before the deal went bankrupt.

On the Town Square side, in July 2007, the deal was put together for a loan in the amount of ninety-five million dollars to Jeff Soffer (ph.) and Jackie Soffer (ph.) personally as the borrowers. It's a big difference too. There, you have them as the borrowers. Fountainbleau; you have them as guarantors. But there, that loan was funded after an extension throughout the period in the tune of seventy-two million dollars before the extended maturity date came. And LBHI was sued on that day.

I bring up these differences in the deals and the complexities because as Your Honor probably saw in the briefing what these developers have tried to do is saying that these deals are substantively identical, that notwithstanding the separate fully integrated agreements at issue; the different timing, all along they thought they were dealing with Lehman. Notwithstanding the separate contracts, the separate timing, they thought all these contracts were really together and that the terms of the deals didn't matter.

Your Honor, on both side of the table here you have sophisticated parties that have done many loans and many deals. Each party understood each term and negotiated each term of

this deal, and that's important here because there is not even an allegation in this case that LBHI was more business savvy or in a better business position when negotiating these deals. This isn't a story of one party using fraud or misrepresentation to take advantage of a less sophisticated party, which happens in most of the cases that are cited in their briefing.

What you have here is a sophisticated land developer who asked for and received hundreds of millions of dollars in loans from LBHI. They took all the benefit from those loans. They poured into their properties, and then the market crashed. And their properties aren't worth what they hoped it to be worth. And now they're looking for a way out. They've come to this court as a sophisticated party looking for a do over, but it's really more than a do over, Your Honor, because a do over would be unwinding these deals, repaying the money, having LBHI release the guarantees, releasing the collateral. They don't want that.

What they're asking this Court to do is use this fraud claim that's the same in all the cases so that they can keep the money, keep their consideration and gut the only consideration that went to LBHI. They're asking to come to this bankruptcy court, use this process to act as if LBHI never lent the money in the first place, and they do that through that fraud claims, which gets to my side of the point, Your

Honor.

Each case includes this same claim of fraud. It's important to focus on that fraud claim early in this litigation, and the fraud claim just got brought up. The case has been going on for a while, but it caused a delay because it did just get brought up for the first time late last year. We're trying to focus on it as early as possible because if the developers are right then any party can come to this court and any party who owed any Lehman entity anything can say that they no longer need to repay what was given to them, that they can walk away as if nothing every happened because Lehman concealed its finances leading up to its bankruptcy. At law, that type of fraudulent concealment claim cannot stand; here specifically for four reasons I'll touch on.

First, the fraudulent conduct is not and cannot be pled with particularity. Second, the duty to disclose, the reasonable alliance, the materiality cannot be pled with particularity. Third, the fraud improperly relies on a promise to do something in the future. Here, it improperly relies on Lehman's ability to fund in the future. And fourth, I won't discuss this today, but our briefing does touch on it, and that's the economic loss rule does bar their claim at law.

Your Honor, if we're right on any of those four points, at law, there can be no fraud and no amount of facts can change that analysis. Under 9(b) --

THE COURT: Are the -- let me just break in and ask you this question. Are you saying that this is not a function of the manner in which the causes of action have been alleged in the counterclaims or in the complaint, but rather that as a matter of law under no circumstances could a party in the position of these entities ever assert claims that would pass muster?

MR. MCCARTHY: I think it's two parts, if you -- I may, Your Honor, I'll take them in reverse order. As I see it here, there is no way that these parties, based on the sophisticated nature of them and the terms of this deal, could use the repos and the supposed fraudulent concealment to make out a claim for fraudulent concealment.

Now, taking the first part, at minimum, these claims do not meet muster under 9(b), and they are not pled to give Lehman reasonable notice -- fair notice as to what was pled. So -- and as I see it, if Your Honor does give them an opportunity to amend, I think we'll be back here again seeign that they just cannot make out a claim here. There's no nexus between the fraudulent concealment and this case.

THE COURT: Okay. So you're looking for dismissal without leave to amend?

MR. MCCARTHY: We are, Your Honor.

THE COURT: Okay.

MR. MCCARTHY: And of course, in the alternative, we

would ask for the other with the atonement. But yes, we do believe there is no reason to amend here. These cases have gone on long enough, and this is too much or a farfetched fraud claim.

Your Honor, here, under 9(b), LBHI is not on fair notice of what the claims are. The Second Circuit clearly requires somebody to point out the who, the what, the where, the when and the why. Because of having no nexus between this claim, they haven't met of those steps. All they do is cite to the examiner's report and Lehman's bankruptcy, and they say that Lehman -- again, Lehman, not LBHI or anybody specific to this deal, knew about repurchase agreements going on between 2007 and 2008. The applicable time period here is June 2007 for Fountainebleau and July 2007 for the Town Square case. That's when the deals were executed.

Anything that happened after that certainly could not have induced these parties to execute an agreement which had already been executed. There's nothing that happened after that that would have induced them either. But before June and July 2007, they point to nothing in their complaint that shows that Lehman -- somebody at LBHI said something to them regarding the finances, that they asked LBHI for anything regarding their finances. There's nothing that points to a who, a what was said, a when it was said, or why what was said or wasn't said could have been fraudulent with respect to this

deal.

All they do is describe that these repos occurred and that certain high level execs at Lehman knew they were occurring and told the examiner that this was the purpose of those repos. But they don't link any of that; the high exec knowledge with the deal at issue. And without linking it, there can be no causation. There can't be materiality. You don't have any reasonableness of their reliance.

One of the biggest points that you'll see in the briefing is that the developers never point to anybody specific at Lehman that made an omission or a statement. All they say is Lehman, let alone LBHI. The law specifically forbids this, and we pointed in our briefing to Mosby -- to Millsby Polar Molecular (ph.). That's 12 F.3d at 1170. It's a 1993 Second Circuit case. And there it said 9(b) is not satisfied where all you do is cite two defendants.

THE COURT: I'm sorry, where all you do is cite two what?

MR. MCCARTHY: Defendants, excuse me, Your Honor. In here, they try to make a distinction saying we're not citing two defendants. We're just saying -- we're saying Lehman. There's -- that's a distinction without a difference, Your Honor. They need to put us on notice by saying who was supposed to have said something or who actually did something; otherwise, we're left here to guess. And the law requires

more.

They also have to make out -- putting aside the who, what, where, when and why, they have to make out a duty to disclose. Their claim of fraudulent concealment can only exist if somebody at LBHI had a duty to disclose something to these developers with respect to this deal. They cite nothing for this duty. They don't ever plead that they requested financial information from LBHI, that they reviewed financial information from LBHI or that they were entitled to review the information. The contracts certainly don't state that they were, and they don't point to any of that in their complaint.

Again, we're left to guess, and the law requires more. To avoid this law, what they do is point to a few cases that talk about active concealment. And what they argue in their briefing is that where you have active concealment you don't need to have a duty to disclose. The two cases they cite to are the Lombrozzo (ph.) case from 1992 and the Haberman (ph.) from 1975. Your Honor, these cases are not even close to being on point. The Lombrozzo case doesn't talk about duty one way or the other. The Haberman case actually required a duty, and they found that -- in both cases what you have is a home seller going into the home before a seller comes to purchase the home and actively concealing issues with the product being sold; the actual home.

And there, the Court found in Haberman, for instance,

that when you do that, when you go into a home -- although the contracts might not say you had a duty to disclose something, when you go in and actually mess with the product as being sold knowing that the seller will want to find out that information, then that puts you on duty to tell them about what you did.

Here, the product being sold was a loan. And they got what they wanted. And I don't hear any complaining about the hundreds of millions of dollars that they've borrowed. Instead, what they're saying is what Lehman did is hid finances that were unrelated to these loans. Maybe those cases would be similar if the home seller actually concealed within its finances but then sold the home, and then the buyer's sitting there with a home which its loves but is telling the -- now it doesn't want to pay the seller because the seller had issues with its finances.

Your Honor, bottom line for fraudulent concealment, there has to be a duty to disclose the information. The developers haven't pointed anything that requires LBHI to tell them about their finances. They aren't stockholders that were investing in LBHI stock. These were developers that were taking a loan, required to pay back that loan.

The reasonable reliance is even easier to see how it could not have been reasonable; them relying on Lehman's finances because you only need to turn to the contracts at issue. Here, the developers do not allege and they certainly

are not boilerplate take it or leave it contracts. These are contracts that were negotiated by both sides. They're the exact type of guarantees and integration clauses that courts in the Second Circuit find bar fraudulent inducement claims like this. For instance, in Citibank v. Plapinger in 1985. That's 495 NY F2.d 309. The court faced a large deal with sophisticated parties and guarantees and integration clauses like you have here.

Dismissing the fraud claim, the Court said "to condone the defendant's own fraud and deliberately misrepresenting their true intention when putting their signatures on the absolute and unconditional guarantee." These sophisticated developers, they can't just say we didn't mean it when we said those were fully integrated agreements and that we weren't relying on anything outside of those agreements. Given these contracts and the way they were negotiated, there was no way LBHI or anybody at LBHI could have known that these developers, assuming they were -- we don't see it in the complaint -- were relying on some financial information that's outside of these contracts.

Even if -- even worse is their prior pleadings undercut this whole reasonable reliance argument. The Court in Emergin in the Southern District in New York in 2001, that's 165 F.2d, 615, faced a very similar issue. And the Court found where your prior pleadings make no mention of the issues raised

for the first time in the fraud claims the plaintiffs are "undercutting its reliance issue." That's exactly what happened here, Your Honor. These claims have been outstanding for a long time, as Your Honor knows. They had original complaints. They have proof of claims. None of those claims mention anything to do with Lehman's solvency or Lehman's finances as something they relied on.

It wasn't until they saw the examiner's report and the resulting shareholder lawsuits that we heard for the first time late last year that they know believe they were relying on Lehman's finances with respect to entering these deals. And what they've done isn't plead in the alternative. In the original complaints and in this complaint to an extent, they say that they were relying on Lehman's ability to fund and its promise to fund in entering into these loans. Now, the argument is we were relying on Lehman's finances. That's not pleading in the alternative, Your Honor. That's making up new facts.

Finally, under --

THE COURT: Well --

MR. MCCARTHY: -- 9 --

THE COURT: -- let me just ask you a question then, because I hear what -- I hear all that you're saying. But isn't there something that amounts an implied representation on the part of every lender, especially a major institution such

as Lehman was in 2007, that it had enormous financial resources and the capacity to perform with respect to the loans that it was entering into at that time? And isn't it also at least fair to conclude that part of what is being alleged here is that we relied upon the soundness of the financial institution with which we were dealing? It turned out that that was not a sound financial institution and that one of the reasons that we ended up in this predicament is that we now know that there were some transactions that were apparently designed to conceal the true state of Lehman's financial condition?

That's effectively what they're saying. You're saying that does not establish under any stretch of the imagination a cause of action that can get to trial.

MR. MCCARTHY: Your Honor, if I understand what you just made out that that's actually not what they're saying because they cannot argue that Lehman didn't perform under these loans. You're right. When Lehman said it was going to perform under these loans, it entered into contracts and said we will perform. We will give you the money you're asking for. The contracts lay out those duties. In fact, Lehman did perform under these loans. It fully funded an eighty-five-million-dollar loan. It fully funded 163 million with its co-lenders on the Fountainebleau loans with no default called before the Fountainebleau went bankrupt.

On the Town Square loan, it fully funded first the --

through the first term, extended, then funded more dollars after the bankruptcy until it looked at the project and made a business decision that this project is going down. Your Honor, there's nothing in the record to suggest that despite Lehman's issues with its solvency it could not perform and continued to perform. Even at -- even after its bankruptcy, and on the date of the disclosure statement, Lehman was cash heavy and liquid and could perform on these loans. In instances it made business decisions not to, and the terms of the contract can cover that, for instance, but that's -- it wouldn't be fraud even if Lehman didn't perform.

It would be a breach of contract there. The fact here is Lehman did perform on the contracts, and that leads right to materiality. They can't make out a claim for materiality because they can't explain how Lehman's financial condition was material to this deal. That would have been material to some stockholder who was investing in Lehman, possibly. Would it be material to someone who was asking for more than the contract stated? Possibly. But here, Your Honor, LBHI funded under the loans.

The developers weren't investors. The relationship here, the nexus between Lehman's overall financial status in this deal, is much too remote and tenuous. The only thing that was material to this deal was LBHI's financial ability to fund the loans. And it actually did that even after its bankruptcy.

The financial condition of Lehman in general, after seeing that, was not only not material, it wasn't relevant to this deal after you see the funding.

THE COURT: Well, maybe I'm missing something then. What is it about the fraud claims that you're now seeking to dismiss that if they were allowed -- let's just say they weren't dismissed. They just stayed in the case. How would they operate to excuse the developers' obligations to Lehman?

MR. MCCARTHY: Well, the developers certainly haven't made that out yet, Your Honor. But my understanding is what the fraud claims would do is two things. One: if you had the fraud, you would wipe out the contracts, right? The -- if you have fraudulent inducement, the contract no longer exists; the terms of the contract other than perhaps some damages related clauses.

THE COURT: Well -- and you're saying that they're counting on fraudulent inducement here because whatever may have been going on within the accounting at Lehman had absolutely no connection to the relationship that existed between the lenders and the borrowers?

MR. MCCARTHY: Absolutely, Your Honor. That's why they could never make out the who, what, when, where and why because they can't show a nexus as to -- they can make that repos were occurring and that high execs at Lehman knew the purpose of those. But they can't show the relationship between

this deal, so I don't know see how they'll ever make out the who; somebody at LBHI that said something with respect to these developers regarding the finances; the what or where that statement or omission took place. All of their claims have no nexus to this deal. And for fraudulent inducement, you have to be induced into taking this particular deal.

At bottom, Your Honor, even if they were able to make out the 9(b) standard, and it's just not here. I mean, Lehman -- LBHI is not on fair notice. The fraud claim fails because they are relying on a statement of the -- of a future promise. And at law, one cannot base a fraud claim on a promise to perform in the future unless you prove fraudulent intent. There needs to be a fixed intention not to perform. The claim that LBHI knew when it made the loans that it would never be able to perform. Here, that claim could never make sense because LBHI did in fact perform.

Moreover, even if you looked at it and said there were fundings toward the end where business decisions were made where they weren't performed, they would need to prove that somebody in summer of 2007 at LBHI knew over a year before its bankruptcy, over a year before they all lost their jobs and the market tanked that they would never be able to perform on this loan. Under Iqbal, it's just not plausible to make that out, Your Honor. And so, what they try to do is distance themselves from this law.

They now say -- they undercut their whole argument by doing it, but they now say we're not saying it was Lehman's solvency we were concerned of or the promise that -- excuse me, that they wouldn't be able to fund in the future. All we're saying is that Lehman hid some of its finances, concealed some finances. And that's enough. Your Honor, if that's all they're saying, there could never be materiality here. How could hiding something that -- just some of your finances impact this loan? The bottom line, even if it was insolvency, it wouldn't impact a loan. They can't have it both ways.

Either they're saying what they argue now; that it was just hiding something about the finances, in which case it fills that law because it can't be material, or they're actually arguing that Lehman should have told them about solvency, which can't make out a claim of fraud, or that Lehman actually made a promise to fund in the future which it failed on; in which case, they cannot prove that unless they have fraudulent intent.

The reality here is that as pled, the claim fails for both reasons, and it fails under 9(b). And that leaves me with what's next. Assuming we are able to get rid of these farfetched fraud claims that have nothing to do with this deal, where does that leave us? Your Honor, we submit that removing these claims from this litigation right now is correct under the law. It makes sense under the law, but it's also -- it

also makes sense under judicial economy. Dismissing the baseless claims now at the outset will allow the parties to focus on the actual transaction, the claims that have something to do with the transaction, the parties that have something to do with the transaction as opposed to everybody at Lehman that knew about repos and the documents that have something to do with the transactions.

Otherwise, we're looking at a discovery schedule that's going to encompass so many things that have nothing to do with these underlying loan documents. Upon dismissal of the fraud claims, we'd be left with three claims. First, the breach of contract claim that's in the Town Square litigation. As of now, we have not moved to dismiss that claim. That claim; it is that LBHI supposedly made an unwritten promise to provide 600 million dollars or so of additional loans under the Town Square deal. We believe there was never any promise there, and we will certainly prove that. Right now, though, we have not moved to dismiss that claim.

You also have an unjust enrichment claim in both cases; the Fountainebleau and the Town Square cases. They're two very separate claims. They fail that law in both instance. For Fountainebleau, the claim relates to fees that LBHI earned with respect to an Aventura mall deal. And Your Honor probably saw the Aventura mall deal in the briefing. That deal is a separate deal, a completed deal, a fully integrated deal that

relates to property in Florida. There can no -- there cannot be an unjust enrichment with respect to that deal because both parties agree that there was a valid and enforceable contract that controls that mall, that loan.

And both parties will also agree that they both -- they both won in that deal. It was a successful deal for both parties. But bottom line, unless you can argue that that contract for Aventura, not these contracts here, but the fully integrated contract for Aventura is not valid or not enforceable, you cannot have a unjust enrichment claim with respect to that deal.

With respect to Town Square, the claim relates to fees that LBHI earned when it extended the Town Square loan. And they're right. LBHI did not move to collect right at the maturity date of the loan. Instead, LBHI gave these developers time to find a solution. It extended. When it extended, of course it got fees. The reason you can't have unjust enrichment there is because both parties got exactly what they negotiated for in the extension; here, an extension, and to LBHI's fee -- LBHI got fees earned. You could never have unjust enrichment where both parties at law got exactly what they negotiated for under the terms of a contract.

Finally, Your Honor, the third claim that remains is the promissory estoppel claim in Town Square. Assume the fraud is dismissed, that claim is still there in Town Square. We

LEHMAN BROTHERS HOLDINGS INC., ET AL.

have moved to dismiss that claim. It relies primarily on the same set of facts of the Bridget contract case. But instead, it's promissory estoppel; that we should be estopped from collecting damages incurred because we did make this promise for long term financing. As stated, that promise was never there. But even if it was, the pro -- we move to dismiss the promissory estoppel claim because promissory estoppel at law has a reasonableness element.

And here, the explicit terms of the integration agreements and the guarantees in the loans, when you put that together with having sophisticated parties, you cannot have promissory estoppel at law. Given the terms of those loans, it was unreasonable for them to rely on any unwritten promise. And you do have -- without a doubt, you have integration clauses and full integration clauses in both of these agreements.

Your Honor, in conclusion, for all of the reasons I stated today and in our briefing, I ask that you dismiss the Fountainebleau amended counterclaims in their entirety and dismiss count 1, 3 and 4 in the Town Square amended complaint. Thank you.

THE COURT: Thank you. Before you start --

MR. MEISTER: Good afternoon, Your Honor.

THE COURT: -- before you start, you may want to screw in that microphone.

MR. MEISTER: Okay. Hopefully, this will work. Good afternoon, Your Honor, Stephen Meister; Meister, Selig & Fein for all the parties adverse Lehman on these two adversary proceedings. For simplicity's sake, if it's okay with Your Honor, I'll simply refer to them as the Turnberry entities. With me today are Chris Major and Remy Stocks of my office, Dennis Richards, co-counsel and a representative of the client, and in-house counsel, Mario Remi (ph.)

THE COURT: Okay. There -- I see three adversaries. There's 5, 6 and --

MR. MEISTER: I'm sorry. There are two on Fountainebleau and one -- I beg your pardon. So in all three, we're representing -- I'm speaking for all the parties adverse to Lehman.

THE COURT: Okay.

MR. MEISTER: Your Honor, counsel either misapprehends or at the minimum seriously mischaracterizes the gravamen of our claims and counterclaims. One critical document I'd like to spend a moment on at the outset because it really sets forth in very simply terms the essence of the claims is an affidavit which is attached to the pleadings Bret Ersoff (ph.). Mr. Ersoff was a high ranking Lehman employee who is deeply involved with the Turnberry account. He was a managing director and a vice president.

In his sworn affidavit, he states that "During my

employment with Lehman, the Turnberry business entities related to the Soffer family" -- that's the family that controls Turnberry -- "were large and valued clients of the firm with whom we did a significant number of transactions, including major loans. The relationship with these clients and others like them was such that Lehman and Turnberry would quickly agree to the terms of financing on an all or informal basis and documents would be prepared later."

Mr. Ersoff goes on to say that in early 2007 "Lehman wanted the financing business of Turnberry's Aventura mall in Florida." And that's this third property that's different or not either the Town Square property in Las Vegas or the Fountainebleau property in Las Vegas, but a third property owned by the same group of developers. He goes on, Mr. Ersoff, he says "Other lenders were competing to make the same loan. If Lehman was able to get that business, Lehman could use the loan to anchor a large securitization, sell the securities and make a profit. This business was a core part of our group. The Aventura mall loan would lift the quality of the entire securitization based on the quality of the assets" -- "a quality of the asset."

He then goes on to say "In order to obtain the Aventura mall financing in the amount of 430 million, Lehman offered to and agreed to provide the Aventura loan on a nonrecourse basis and to provide a nonrecourse 625 million

dollar loan on Turnberry's Town Square project in Las Vegas and to provide 400 million dollars in financing with limited recourse on the retail component of Turnberry's Fountainebleau's proj" -- "Fountainebleau's Las Vegas project. Lehman was given the Aventura mall financing business it wanted and as planned, placed the loan in a three-billion-dollar securitization sold by Lehman in the fall of 2007."

"As it promised, Lehman also financed the retail component of Turnberry's Fountainebleau Las Vegas project. Before making the promised 625 million dollar Town Square loan, Lehman made a temporary 95 million dollar bridge loan secured by direct and indirect interests in the related asset. Although the bridge was made in the names of Jeffrey and Jacqueline Soffer personally, its proceeds were used" -- "its proceeds were for use" -- excuse me -- "in the Town Square project. And it was understood and agreed by the Soffers and Lehman that the 95 million dollar bridge loan would be repaid by the 625 million dollar nonrecourse permanent loan to the Town Square business entity."

He finally goes on to say "Ultimately, Lehman was unable to perform the 625 million dollar loan. To the best of my recollection, prior to Lehman's bankruptcy, it had never failed to perform a loan transaction it had agreed to do with any of Turnberry's entities."

So Your Honor, what I find unusual about this case and

unusual about the motion to dismiss is it's true here we are making a fraud and the inducement claim. No question. But here, the promise aspect, if you will, is admitted by Lehman going in. Here, we have an affidavit attached to the pleadings in which a Lehman employee at the time, a high ranking Lehman employee, is admitting exactly what we're alleging. So what we're saying in the connection between really the three properties is that there was a three-way deal.

The deal was Lehman wanted this low loan to value, 430 million dollar Aventura mall refinancing to anchor a three-billion-dollar securitization that we had, that my clients had other offers to finance on that were even superior. They agreed to give Lehman that financing to enable it to go forward with that securitization, that three-billion-dollar securitization, on condition that Lehman provide an -- a 625 million dollar loan on the Town Square mall, which was then substantially toward completion, not fully leased up, and a 400 million dollar loan on the retail component of the Fountainebleau Hotel and Casino project, which I think took the form of a 315 million dollar senior loan and an 85 million dollar mezzanine loan.

When counsel says the loans were performed, that's an absolutely false statement. You just saw Mr. -- or heard Mr. Ersoff's statement that the 625 million dollar permanent loan commitment on Town Square wasn't performed. But in addition,

LEHMAN BROTHERS HOLDINGS INC., ET AL.

it's undisputed -- or certainly, it's alleged that of the 400 million dollar retail loan on Fountainebleau only 250 or so million dollars, approximately, was funded and 150 million, approximately -- I think it was 147 million was unfunded. And contrary to counsel's statements, the facts are that it was Lehman who pulled the plug on the Fountainebleau project, and it was Lehman's recanting their 400 million -- the balance of their 400 million dollar commitment which drove that project into bankruptcy -- the Fountainebleau project.

The project was sold at a bankruptcy to Mr. Icon (ph.). And the Town Square project was ultimately lost in foreclosure by the Turnberry entities because of the failure of Lehman to make good on its 625 million dollar loan commitment, which is attested to in Mr. Ersoff's affidavit. So you grasped exactly correctly, as I heard your words, the essence, the gravamen of our claim. What we are saying is that in early 2007 Lehman cooked its books, fraudulently removed billions of dollars of both assets and liabilities from its balance sheet through these repo transactions, which were clearly loan transactions that Lehman fraudulently booked the sale transactions so that the assets were removed, as the examiner noted, days before the end of a reporting period and then put back on the books days after the end of the reporting period.

And the affect of that fraudulent removal of tens of billions of dollars of assets -- of troubled assets, of MBS,

mortgage backed securities, in a plummeting market was to fraudulently diminish the degree of Lehman's leverage. And so, while counsel speaks of insolvency and a -- there being no duty to disclose insolvency, in fact, the word "insolvency" doesn't appear anywhere in our claims or counterclaims.

We're not alleging that Lehman was insolvent. What we're alleging is that Lehman was highly unstable at the time, financially unsound if you prefer that terminology, at the time it made these promises to us and that we were misled about its stability because we were reviewing fraudulent accounting statements. Now, you can go ahead and say that well, how do we know Jeff Soffer or Jackie Soffer read those statements. That's besides the point because, Your Honor, under the Twombly and Iqbal plausibility test, where this Court makes a context, sort of common sense approach, in my lingo, are you kidding me kind of test about the allegations, here you have a financial institution; one of the largest, most respected investment banks in the world at the time which is being judged and watched by Moody's, Standards & Poors (sic), Fitch Ratings and countless stock analysts.

And they were all taken in by these fraudulent accounting statements.

THE COURT: You keep that they're fraudulent, and I'm not going to stop you from saying that. But there's absolutely nothing that's in front of me right now that proves that

assertion. Instead, there is a general incorporation by reference of Mr. Valukas' extensive report, which references, among many other things in the report, the existence of these so called repo 105 transactions, which I gather is what you're alluding to.

However, it's also true that in the immediate news cycle that followed the public disclosure of Mr. Valukas' report I'm aware that the Wall Street Journal and other news outlets following what goes on on Wall Street referenced the fact that transactions of this sort were not limited to Lehman Brothers. And in fact, this kind of creative accounting is something that was not limited by any means to Lehman.

I am by no means suggesting that I countenance what was done during that period, not am I making any comment as to whether or not the legal opinions that were issued out of London concerning these transactions sanitized those transactions or may have part of some very concerted effort to create a legal self-harbor for them. But the assertion of fraud hasn't been established.

MR. MEISTER: Your Honor, I would respectfully point to one word you said a moment ago, and that is you said you don't think I've proved fraud. Okay? I'm not required to prove anything at this stage in the proceedings.

THE COURT: I'm not suggesting that you've pro --- that you need to prove anything. You're just alleging things.

MR. MEISTER: I'm --

THE COURT: It's just that you're sug -- you're adverting to documents and suggesting that the facts that the Valukas report discussed repo 105 transactions amounts to fraud.

MR. MEISTER: Let me be more specific, if I may. Maybe it will be helpful, okay? If a financial institution holds ten billion dollars, to pick a number, of financial assets of some type. In this case, I think it was mortgage backed securities, and they're dropping in value. And it goes and it pledges them to borrow money from another financial institution secured by the -- that ten billion dollars of MBS, mortgage backed securities.

The booking of that transaction, as I understand it, would be that the ten billion dollars would con -- of securities, although pledged, would continue to be shown as an asset on the balance sheet of Lehman and the loan -- if it got, for argument's sake, a seven-billion-dollar loan against the assets would show up as a liability.

In a repurchase transaction, what happens is that the lender says I will buy the asset -- the assets from for seven billion dollars subject to your right to buy them back for seven billion plus interest on a certain date; seven days from now, ten days from now, what have you. My understanding of gap -- and I concede I am not an accountant, okay, but my

understanding is that that transaction in economic substance, whichever way it's expressed as a -- an outright loan or as a repo or repurchase transaction, is an economic substance alone and that booking it as a sale if fraudulent.

Now, I think at this stage of the proceedings if I simply allege it is a fraud I think that is sufficient. Now, maybe the issues you raise, Your Honor, will come into play at a trial level or perhaps at a summary judgment level, where you -- where this Court tests whether that is indeed a fraud. I would also respectfully submit, given on what's on in the world, I for one am not terribly impressed that other financial institutions besides Lehman engaged in this process. Perhaps they were all committing fraud.

I don't think that my clients' complaint should be thrown out if it in fact is the case that Lehman was one of several investment banks that committed this sort of, I think, fraudulent accounting practice. It --

THE COURT: Let me break in and ask you a question, though, which is to me critical to this whole argument. Let's just say for the sake of this discussion that I agree with you that the mere fact that the Valukas report is generally incorporated by reference constitutes some ability on your part to proceed with claims of fraudulent inducement. What are those claims?

MR. MEISTER: The clai --

THE COURT: Let's just say for the sake of argument that some time prior to June and July of 2007 Lehman in the ordinary course of its accounting practices before quarterly reporting engaged in so called repo 105 transactions. So what?

MR. MEISTER: The so what is very simple, Your Honor. The so what is -- here is the syllogism of our argument. It's very simple. First of all, I want to just be clear about one or two facts that we allege or allegations we make because I think they bear on this. Contrary to what counsel said, we make very specific allegations that there were fifty-nine billion dollars of repo transactions in the first and second quarters of 2007, and the first quarter begins December 1st, 2006 due to Lehman's fiscal year. And that fifty-nine billion dollars of repo transactions predated all the relevant loan documents and guarantees in these adversary proceedings. That's number one. So counsel's statement to the contrary is simply incorrect.

Number two is there are allegations in the complaint -- there are quotes which are taken from the examiner's report where high ranking individuals at Lehman spoke in disparaging terms about these repo transactions, which I think lends some credibility -- additional credibility to our view that they were fraudulent.

THE COURT: You're talking about the quotes from Martin Kelly?

MR. MEISTER: One of them is from Martin Kelly, one of them is from a Mr. Jin Tilly (ph.), a CFO who increased the availability or the dollar limits for the repo transactions by three billion dollars.

THE COURT: How does this connect to your claims, however?

MR. MEISTER: The connection, Your Honor, is simple, okay? I've talked to you about the Ersoff affidavit, and it's very clear that you had a three-way deal. You had Lehman asking for the 430 million dollar Aventura mall refinancing -- don't give it to anyone else -- to anchor a three-billion-dollar securitization. That's part one.

Part two is we will gi -- if you give us that, we, Lehman, will give you, Turnberry, two things. We'll give you 625 million dollars of permanent financing on Town Square, and we'll give you 400 million dollars of retail financing for the retail component of Fountainebleau. That's the three-way deal.

What we're saying is very simple. What we're saying is that at the time that that handshake was made that Mr. Ersoff attests to the world financial community of stock raters and analysts and credit raters like Moody's and Standards & Poors (sic) had been duped by Lehman's fraudulent accounting practices into having a mistaken impression of the financial stability of Lehman due to an underappreciation of their leverage levels. And as a result of that, we entered into this

transaction where had they had been honest and reported the repurchase transactions as loan and had the financial community understood that the true degree of their leverage, then the impression of Lehman in the financial community in early 2007 would have been much more like it was in mid 2008.

And then, we would never have entered into these guarantees because, in other words, on that 95 million dollar advance on the 625 million dollar loan, which was made to the Soffers individually, the contemplation, the clear understanding was that was a pre-advance on what was going to become a 625 million dollar loan. So it never had to be paid back if they fulfilled their obligation.

If we knew at the time that they promised to make the 625 million dollar loan that they were so highly leveraged that they might not be able to make the 625 million dollar loan we wouldn't have entered into the transaction with them. And therefore, we were fraudulently induced into the transaction. That's the connection. And that is a plausible claim. That is a plausible claim.

Your Honor, I ask you to consider this. If you had ninety-nine to one leverage on an asset class that drops just two percent in value, which is a very small drop, you are insolvent because now you have ninety-eight dollars for every nine-nine dol -- of value for ninety-nine dollars of debt. If you have a leverage ratio of seventy to thirty and your asset

class drops twenty-five percent in value, you're solvent because you have seventy-five dollars in value and seventy dollars in debt. So leverage is crucial.

And the reason that -- ask yourself, Your Honor, why did they engage in these repo transactions. Why did they do it just before the reporting period? And why did they put the assets and liabilities back on just after the reporting period? Precisely because they knew that if the analysts at Moody's and Fitch and Standards & Poors (sic) saw their leverage levels they would have downgraded them. And had those -- and they did downgrade them at a later time. And had those downgrades occurred, we wouldn't have entered into these transactions.

So here you have Lehman suing on a ninety-five million dollar loan, a per -- in essence, a guarantee. It's their makers, legally speaking, that wouldn't gone into place but for my clients having been fraudulently deceived about the stability of Lehman's financial condition. And ultimately, they didn't fund the 625 million dollar loan. They didn't fund 150 million of the 400 million dollar loan. And by the way, they didn't fund twenty-four million of the ninety-five-million advance.

Your Honor, I would like to tie this back, if I may, to Twombly and Iqbal, the two United States Supreme Court cases that created the so-called plausibility test in a 12(b)(6) motion to dismiss, because I think ultimately --

THE COURT: You also have a 9(b) problem here too.

MR. MEISTER: And I'm going to address the 9(b) issue, but I'd like to take them in that order quickly, if I may.

Iqbal made clear that the test is a two-part test. In the first instance the Court is charged with determining whether any of the allegations of the complaint are conclusory. If they are conclusory, then they become disentitled to the presumption of truth that otherwise inheres. In other words, if they are factual or nonconclusory, then you must presume them to be true for purposes of deciding this motion. Now, regardless, you then take the allegations that are nonconclusory and decide whether those claims make out a plausible claim for relief. That's the two-part test.

So the first thing that I want to point out is that I strenuously disagree and don't, quite frankly, see how one could possibly conclude that the allegations are conclusory. Conclusory means the defendant negligently drove his car into plaintiff's car. That's a legal conclusion. Here it might be Lehman fraudulently prepared its books and records. That's not at all what we say. We give very specific recitations of the 105 and 108 transactions of their effects on the books, not only by reference to the examiner's report, but by restating them in the complaint.

And Your Honor, I would point out that under Federal Rule, I think it's 10(c), it says: "A statement in a pleading

may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes."

Now, it's true we didn't attach this voluminous report, but that would have been silly because it's in the court records, so we reference the report. And I believe under 10(c) of the Federal Rules, we are entitled to have this Court deem the statements in the examiner's report as if they were alleged at length in our complaint.

THE COURT: But the examiner's report is not a pleading.

MR. MEISTER: But that doesn't matter. It's not a pleading, but it's an exhib -- it details the nature of the fraud. Now, there are statements --

THE COURT: The examiner's report was prepared pursuant to an order of this Court for a set of express purposes to facilitate the reorganization of Lehman Brothers and to provide transparency to parties-in-interest. It fulfilled that purpose, and it did so very well. It is not, however, a document of the sort that one can advert to the way you are and say, well, because something is contained in the examiner's report that supports my independent cause of action. In effect, there's no nexus here between what's in Mr. Valukas' report as to what he discovered and what you're alleging.

MR. MEISTER: Your Honor, first of all, let me just say, Lehman says repeatedly that the examiner's report is not binding on this Court, which is true, and that it's not evidence, which I agree with. Okay? We are not submitting it as evidence and we have no evidentiary burden on us at this time.

The only reason we reference it is because the transactions -- the 105 and 108 repurchase transactions are complex transactions. We are in a -- laboring under a notice pleading system. And we thought it would be helpful to Lehman, in understanding the nature of our claims, to incorporate that by reference. That's it. I don't want to make more of it than it is.

I would respectfully submit that within the four corners of our complaint the allegations are more than sufficient. We explain the repo transactions. We explain that they're loans and not sales, that they were frauds and that they removed assets and liabilities from the balance sheet, misled readers of the report, and we relied on it and wouldn't have engaged in the transaction, which was a three-legged transaction: the 625 million dollar Town Square loan, the 400 million dollar Fontainebleau retail loan, and the Aventura financing, in the absence of that understanding which was fraudulently based as to their financial stability.

THE COURT: I'm going to revert to your earlier

articulation of the Iqbal rule which, in your terms, amounts to: Are you kidding me? Because I have a really hard time, on pure plausibility grounds, believing, based upon the two components that your argument rests on, that your clients seriously considered, in 2007, any issues with respect to the financial strength of Lehman. And in fact, in point of fact, there were no questions in 2007 --

MR. MEISTER: But Your Honor --

THE COURT: -- as to the financial strength of Lehman Brothers. We're talking about a time that pre-dates the advent of the financial crisis which led to the, in effect, end of the world as we know it.

And just give me a chance to finish.

MR. MEISTER: Sure.

THE COURT: You have talked about the Ersoff declaration as, in effect, establishing that there is this kind of loose understanding that happens in the finance community as to these borrowers where people would talk about a deal and the deal would then later be documented. And in that loose environment there was a connection between the Aventura property, which was valuable to Lehman Brothers, and the financing of these two projects in Las Vegas.

I have absolutely no doubt that that in fact probably happened. And in the real estate finance community the parties may have had certain understandings. That doesn't mean there's

an actual tie-in. That doesn't mean that these are legally connected transactions. That doesn't mean that what was in anybody's mind at the time, once documented, controls the documents because of the integration provisions that we're familiar with.

And I'm not done.

Under these circumstances, I find it truly implausible to believe that your clients had in their minds anything with respect to Lehman's financial standing, considered for a minute anything about Lehman's financial statements or knew anything about what a repo was or might be. There's nothing to suggest that. And so I have a very hard time, even if I were to conclude that the Valukas report allegations are somehow properly incorporated in your pleading, that you have alleged anything that amounts to fraud as to these transactions.

MR. MEISTER: Let me see if I can change your mind, Your Honor. Okay? So let's take two different pieces. One is the tie-in and one is my client's perception about Lehman's financial stability. Okay, let's deal with those two things.

First of all, Your Honor, we're at the pleading stage. In point of fact, there is hard evidence of the tie-in. It's not loose, as you suggest. Suppose I were to tell you there are e-mails from Lehman that say: "We're doing a three-way deal; if you give us the Aventura loan we will give you this 625 million and this 400 million." Suppose there are a half a

dozen term sheets that are circulated in the 625 million and there are, you know, term sheets on the 400 million, and there are e-mails from Lehman personnel that absolutely tie it in. So Your Honor, respectfully, your rendition of the facts is not correct.

THE COURT: It doesn't matter. Yesterday the Second Circuit, in a summary order, affirmed a decision that I rendered some time ago that was later affirmed by District Judge Swain, in a case called LH 1440. In that case, the question was whether certain parts of a related loan transaction were in fact fully integrated or whether or not they were separately transferrable. And in that particular instance, which involved State Street Bank, there was a repo of one part of what, at least the borrower thought, was a fully integrated loan. It didn't matter what the borrower thought because the loans were separately transferrable. It doesn't matter what these e-mails say. What matters is what the documents say.

MR. MEISTER: Your Honor, if I may. With respect to a fraud claim, that may be true. With respect to a fraud in the inducement claim that is not the law of New York.

In a Second Circuit decision, Manufacturers Hanover v. Yanakas, the Second Circuit held -- quoted to another decision, and it said, quote, "If a contract recites that all of the parties' agreements are merged in the written document, parol

evidence is not admissible to vary, or permit escape from, the terms of the integrated contract. Such a general merger clause" -- this is the other case that they're quoting to -- "is ineffective, however, to preclude parol evidence that a party was induced to enter into the contract by means of fraud."

The Second Circuit continued, quote, "Thus, even when the contract contains an omnibus statement that the written instrument embodies the whole agreement, or that no representations have been made, a party may escape liability under the contract by establishing that he was induced to enter into the contract by fraud."

That is to say, sir, that an integration clause, particularly an omnibus generalized, boiler plate integration clause, does not bar, as a matter of law, a claim of fraud in the inducement. Let's not forget here what we're talking about, for example, in Town Square, is this ninety-five million dollar bridge loan.

That document says -- that document has an integration clause that says that -- and I have it quoted here, "This agreement and the other loan documents embody the entire agreement and understanding between the parties with respect to the" -- capital L -- "Loan" -- which is that ninety-five million dollar loan -- "and supersede and cancel all prior loan applications, expressions of interest, commitments, agreements

LEHMAN BROTHERS HOLDINGS INC., ET AL.

and understandings, whether oral or written, relating to the subject matter hereof" -- which of course is the ninety-five million dollar loan -- "except as specifically agreed to the contrary."

That's an omnibus, you know, sort of very generic, boiler plate integration clauses that lawyers use all the time.

Here you have a 95 million dollar loan and you have an allegation, supported by a sworn statement of a Lehman employee -- admitted by a sworn statement of a Lehman employee, that there was a 625 million dollar commitment, manifold times the 95 million dollar loan. It's absurd, I would suggest, to say that an integration clause in the 95 million dollar loan bars a claim with respect to a 625 million dollar loan. That's just not the law. It's a fraud in the inducement claim.

Your Honor, I would like to take a moment to address, because I do agree, actually, with what you said; I just don't agree it bars my claim. I think you're absolutely right when you say, Your Honor, that in early 2007 my clients were not fearful of Lehman's financial stability. I think that's true. I don't know if they know about repurchase transactions. I wouldn't be surprised, though, if it was true what you said, that they didn't. Okay?

I don't think that bars my claim. I don't think it renders it implausible. In fact -- and I don't think it matters that that was a year or a year and a half -- not a year

and a half, a year and change before the collapse. In fact, what led to the collapse -- what led to the collapse was that the lenders were more highly leveraged than the borrowers even. And there's no question that Lehman was entering into these on and off transactions where they were taking assets and liabilities off of their books just before a reporting period and putting them back on after their books to dupe the financial community.

And so I agree with you that my clients weren't worried about Lehman's financial condition when they signed this. That's exactly the point. But that doesn't mean it's implausible, facially implausible, such that their claim should be dismissed, because the allegation or the essence of the claim really is that had these fraudulent accounting practices not been employed then the financial community would have had rang the alarm bell, in plain English, earlier. And had they rung the alarm bell earlier, they wouldn't have engaged in this transaction -- these transactions; they had plenty of other opportunities at that time. And so I think that it is a plausible claim.

With regard to the 9(b) -- I'd like to get to that before concluding -- I don't think we have a problem under the 9(b). It's not who, what, when, where, why; it's who, what, when, where how. And I think it's absurd, quite frankly, to even discuss the "who" when you're talking about statements

that are contained in published SEC documents, 10-Qs.

In other words, the whole point of the who, what, when, where, the particularity that's required in fraud, is because if you allege that so and so made such and such an oral statement at 3 in the morning in a diner on Broadway, well, the defendant's entitled to know who is it exactly that made that statement, where was he when he made that statement, et cetera, okay, and what was the content of that statement.

But where the fraud is contained in a published SEC document, that completely evaporates away because there's no question in anyone's mind of what the fraud was. It's an adopted statement. So there's no 9(b) problem here. It's just impossible for there to be a 9(b) problem when the fraud is contained within an SEC filing.

I don't think that there is a plausibility problem, even though I agree with you that my clients probably didn't have Lehman's -- not probably, I'm sure didn't have Lehman's financial stability issues in their mind, otherwise they wouldn't have engaged in the transactions. The question, I think, is it plausible to say that in the absence of the financial fraud, in the absence of them cooking their books, would the financial community have rang the alarm bell earlier and would my clients have not engaged in this transaction. Those are the questions.

Why isn't that facially plausible? Why can't I go

depose an analyst from Moody's, put that statement in front of him and say, "If this had been booked properly and if this repurchase transaction for fifty billion dollars had been booked, you know, would that have changed Lehman's leverage ratio if it had been booked as a loan and would that have caused you to change your rating?" Okay? Now, I don't know what the answer is yet, but if he says "Yes, it would have changed my rating," I've made my case, I think; I should be allowed to proceed.

The other thing I also want to touch on briefly, Your Honor, is the economic -- I'm sorry, before I get to that. This notion of a duty to disclose is another red herring because, first of all, I'm not alleging insolvency. I'm alleging that they committed fraudulent accounting practices which hid their true leverage levels, but I'm not alleging they were actually insolvent in early 2007. I don't know if they were or they weren't.

But the point is that it's very clear law in New York that if you have a party that's completely mute and silent on insolvency you have to be able to establish a duty to disclose the insolvency. But once the party actually makes affirmative statements about its financial condition, if those affirmative statements are misleading or fraudulent, then there's a duty to make the statements complete, fair and not misleading. So that's a red herring, because they had affirmative statements

in their 10-Q, and they were misleading.

In addition, there's a special facts doctrine in New York which indicates that even in the absence of a fiduciary duty, where there are just contracting parties -- and here of course you have a borrower and a lender, contracting parties -- and there are special facts of which one party is aware that would make the transaction unfair in the absence of its disclosure, disclosure is required.

So I think, in summary, Your Honor, we do make a plausible claim. We have tied together the 625, the 400 and the Aventura 430 million dollar refinancing, through admissions by Lehman. The question -- the difficult question in this case is what would the financial community of raters and analysts have done with noncooked books, with accurate, fair and not misleading, nonfraudulent financial statements? What would they have done and how would that have affected my client's behavior? Those are open factual questions. But we should be allowed to proceed.

Also, Your Honor, the Economic Loss Rule has absolutely no application to this case. It's another red herring. The Economic Loss Rule says that if I engage an architect to draw plans and the plans are not conforming with a building code and I can't use them, I can't sue him in tort for my money back because I have a bargain, I have a contract for the plans. But if I build the building and it comes crashing

down because of design defects and there's property injury and personal injury, I can sue in tort for my personal injury and property injury. I can't have a duplicative tort claim for my economic benefit of the bargain loss. Aside from the fact that it has no application to this case, in concept, New York courts have repeatedly held it doesn't apply to fraud. So the Economic Loss Rule doesn't bar the claims either.

In conclusion, Your Honor, the allegations of fraud here are pleaded with substantial particularity within the four corners of the complaint without regard to reference to the examiner's report.

The plausibility standard is met, for the reasons I've said, because it is possible and it is plausible that the financial community would have re-valued Lehman's stability had the financial statements been done nonfraudulently. Their statements, because they are particularized, are entitled to the presumption of truth.

9(b) does not present a problem because the fraudulent statements are contained within SEC filings.

We allege that there are fifty-nine billion dollars, which is very significant in relation to Lehman's market cap at that time, of fraudulent 105 and 108 repurchase transactions prior to entering into these contracts, the ones that are at issue. That must be assumed to be true; it is true.

We don't have to have a duty to disclose because we

are not basing the case on insolvency. And in any event, there were affirmative misrepresentations of financial stability which invoked a duty to be accurate when they were describing their own financial conditions.

Lehman's reliance based attack is -- which is really, I think, the plausibility argument, is just something that has to be tested on the proof.

The Economic Loss Rule doesn't apply to fraud claims.

The unjust enrichment claims, Your Honor, are not barred because it's black letter law in New York that when a party seeks, based on a fraudulent inducement claim, to rescind the contracts at issue, then you're allowed to maintain an unjust enrichment claim while those claims are outstanding.

The generalized merger clauses, Your Honor, are simply not barred because we're not talking about a representation about the 95 million dollar loan, we're talking about a different transaction, a 625 million dollar transaction, six to seven times the size. So that generalized merger clause does not bar a claim about a six to seven times larger transaction.

We also think we made good claims for punitive damages because we do think that the public interest is affected here.

Lastly, Your Honor, I want to mention, before we close today, that it's interesting to me that I'm here defending a motion to dismiss against pleadings that were filed in 2009 and early 2010. That's quite a long time ago for us to be

discussing a motion to dismiss. The reason for that -- and there were many, many, many adjournments, over a dozen, on consent -- the reason for that, Your Honor, is that the parties have been engaged in good faith settlement discussions, substantive settlement discussions. I don't know all the details because, honestly, I have not been privy to them; they've been handled by Mr. Soffer and various representatives from Lehman. What really has happened here is that over the course of those discussions Lehman -- the lead negotiator for Lehman I think has changed four times, and obviously it's complex and the new Lehman negotiator has to be brought up to speed.

But the point is that we -- the parties have agreed upon search terms and discovery. They've actually collected all of the documents under those search terms to be produced, and they're ready to produce them and they're ready to conduct the depositions.

I think, if you dwell upon the essence of what we discussed today, and I think the most critical essence is the plausibility, the truth of whether the financial community would have re-rated Lehman and whether the Soffers would have acted differently in the absence of these financial frauds. That remains unproven, but we should be allowed to get to that proof. We shouldn't have these claims dismissed at this stage.

The only reason we're here so late is because -- and I

don't blame Lehman for this, I think it's part of the process; they're in bankruptcy, they're in reorganization proceedings, but there's not quite the longevity to their higher-up employees that there might be in a normal context.

Therefore, Your Honor, we ask that the motion be denied in all respects and that stern discovery schedules be set. And if Lehman wants to test our claims on summary judgment, then that's something else. And frankly, I think the Court is entitled to the comfort and security of having them tested with that discovery behind us.

Thank you, Your Honor. Unless you have any further questions?

THE COURT: I have lots of thoughts but no other questions at the moment.

MR. MEISTER: Thank you, Your Honor.

THE COURT: I think what I'm going to propose is before you come to the podium to respond, as I expect you're going to, I'd like to take about a five-minute break. So let's just stretch until 3:30.

(Recess from 3:22 p.m. until 3:35 p.m.)

THE COURT: Be seated, please.

Please proceed.

MR. MCCARTHY: Your Honor, before I jump into the substance, briefly, I did want to just mention some of the mechanics of the case. The delay was talked about a little

bit, in discovery, and I do want to just clear up the record. Any delay here as to why we're here on the motion to dismiss today is because these fraud claims were just filed late last year. I mean, there's been no delay in moving forward in trying to get these fraud claims dismissed. So --

THE COURT: I also saw the scheduling order which was entered late last year, relating to today's motion, which included setting today as the hearing date. So I'm generally familiar with the record.

MR. MCCARTHY: Thank you, Your Honor. As to the remainder of the case, yes, there has been some overturn in Lehman, of course. But senior management has stayed the same; Ms. Halperin has been on this case since the beginning of this litigation. Change in management hasn't changed the settlement. That has not been the delay. The parties have met together, we have worked together to try to get there. Bottom line, Lehman has responsibilities to its creditors. It cannot just walk away from the hundreds of millions of dollars that are outstanding. That's why we've pushed forward.

As to the discovery, again, yes, the parties have worked together and we're continuing to work together, have come close to settling on search terms. Some of the delay there has been these new claims. You know, we have to decide what we're going to do with repo-related discovery, discovery that has nothing to do with the transaction. And we've been

working together to do that, but there is more to be done. We're still trying to work out a schedule for that discovery. We have the documents to review still, so although we've collected them, they still need to be reviewed. And I think the same is true for opposing side. Most recently we've exchanged a discovery schedule, and I think we've just been asked to give them a little more time on the discovery piece. We're reviewing that and seeing if we can.

As to the substance, I want to let the briefs and the prior arguments speak for themselves on most of the claims, but as to the fraud, what I sat there and was surprised by is what I didn't hear. And I didn't hear how they make out a claim for fraud. I didn't hear how the elements of fraud are made out. Instead, what I heard, and what I saw in most of the briefing, is why they're able to avoid the pleading requirements, why this case is so special that they don't need to meet the pleading requirements.

Your Honor, we cited case law in our briefs, and I think Your Honor is familiar with it, based on what I heard here today. They're not -- you can't just incorporate, by reference, a 2,000 plus page examiner's report and say you've put a party on fair notice. I know we heard today that that was done as a -- you know, to oblige us and help us understand the claims, but it doesn't help anybody have fair notice of what the claims are when you just cite to a 2,000 plus page

report.

Even if you could do that and you could incorporate, by reference, this examiner's report, the affidavit of Mr. Ersoff, and now the new thing we're hearing about today, these SEC filings, taking a look at those items does not support their fraud claim.

I'll start with the SEC statements. Your Honor, where does it mention the SEC statements in the complaint? Where does the complaint or any of the attachments say that anybody from their side relied on Lehman's finances or looked at Lehman's finances or cared about Lehman's finances? Counsel stood up here today and talked about SEC filings and why those are so important to this case. The complaint doesn't make out -- it doesn't even mention SEC filings or anything about what they reviewed as to Lehman's finances or what they wanted to review but didn't.

As to the affidavit of Brett Ersoff, I do want to mention that because we heard a lot today about how that's an admission from Lehman. Your Honor, this is not an admission from Lehman. Mr. Ersoff is a former employee. As the case will go on -- you understand, I'm sure, what you need to do for a motion to dismiss. But taking a step back, as this case goes on, you'll find out that Mr. Ersoff is a former employee who made the statement after he left the company, and the credibility of this statement is in question and will be in question as this case goes on. He's now affiliated with the

Turnberry entities.

But in any case, even if you look at this affidavit and say -- take it for the truth of it, where does it say that they relied on finances? The affidavit has nothing to do with Lehman's finances. It doesn't talk about them caring about Lehman's solvency. It doesn't say that they requested it or that anyone from Lehman talked to the Soffers about the finances before these deals. If anything, this affidavit makes out a claim for a breach of contract with respect to failure to fund the 600 million dollar loan. And they do have a claim for that. I'm not saying it's valid, but we don't -- we haven't moved to dismiss that here today.

They keep talking about this three-way deal to fund the loans. Failure to fund a loan is not fraud; it's a breach of contract claim. They may or may not have that in Fontainebleau. They haven't set one out in their complaint; they don't have the claim. In Town Square they do have a breach of contract claim for failure to fund. Perhaps that makes out a claim for breach of contract. It comes nowhere close to meeting the pleading requirements for fraud.

And then on to the examiner's report. As we mentioned in our briefing, much of the examiner's report has absolutely nothing to do with the repos or the claims in this case, and much of it would actually support LBHI's position. If they cared about LBHI being able to fulfill its obligations under

the contracts -- those are contract claims -- but in any case, if that's what they really cared about, the examiner's report supports, in part, the position that LBHI could fulfill those obligations. It talks about repos not even ramping up until after these -- long after there loans were executed. So if they learned about those repos, if you look at the ramp-up statement in the examiner's report, there's reason to believe that they wouldn't even have thought there was an issue there. And the examiner's report certainly talks about Lehman's liquidity, and that liquidity really wasn't an issue. They had the ability to live up to the contracts that they executed. And the In re Lehman Brothers Security litigation actually supports this too.

You know, here today it really does sound like they'd like to put themselves in the same position as the shareholders, that they were investing in Lehman's finances. They're not even close to that, Your Honor. You know, these were people that were buying a product. They got the product that they asked for. If they didn't, perhaps they have a breach of contract claim. It is not a fraud claim.

But the In re Lehman Brothers Security litigation case at 799 F. Supp. 2d., 289, it's from 2011, they actually dismiss claims in that case by shareholders, someone who were in a far superior position for reliance there, those claims that related to liquidity, because the Court stated, quote, "There are no

facts contradicting the statements that Lehman's liquidity position was sufficient to cover its liquidity needs at any time."

Your Honor, what they're asking for is so unique, and that's why they can't make out a claim of fraud. As borrowers they were buyers, and they got what they asked for. If they didn't, again, let them stand on their Town Square breach of contract claim which makes out the exact same argument we heard today from counsel about this three-way deal.

If these developers are right, then any party could bring any claim against Lehman, and really anybody who made out these repos, saying what you gave us is what we asked for, but we don't care anymore, we don't need to pay for it because if we knew that you had concealed something to do with your finances we're allowed to just walk away and act as if you never gave us any consideration in the first place.

Your Honor, the most important thing that we didn't hear today was reliance. You asked counsel, you know, why you didn't see anything in these papers about someone from the developer's side reviewing the finances or caring about the finances or relying on the finances before they entered into the deal. Your Honor, that's one of the important elements of a claim of fraud.

Counsel stood here and admitted that -- he didn't just say perhaps they didn't review it; I believe he said they

didn't review it. He would agree with you that they didn't care about the finances going into that. That is why they cannot make out a claim of fraud here. That's why they're so very different than an investor in the company of Lehman. Here they were purchasers who got what they wanted.

Your Honor, we ask that you dismiss these fraud claims and dismiss the other claims we've moved to dismiss in our briefing, avoid a long and drawn out, unnecessary litigation with respect to facts that have nothing to do with these contracts or the deals contemplated by these contracts, and allow the parties to focus on the transaction at issue.

They do have a breach of contract claim remaining in Town Square, and we will address that with respect to this three-way deal that Mr. Ersoff alludes to in his affidavit and that counsel talked about here today. But bottom line, the law requires them to plead a claim of fraud with particularity under 9(b) and they have not done that.

Thank you, Your Honor.

THE COURT: Thank you.

Anything from the committee?

MR. O'DONNELL: Your Honor, Dennis O'Donnell, Milbank, Tweed, Hadley & McCloy, on behalf of the committee.

Very briefly, I think the word that I've heard most often this afternoon is nexus. Mr. McCarthy just discussed what the plaintiffs -- what the other parties have been able to

allege here in terms of nexus, and I don't think it meets anybody's standard.

What I think I'm hearing is, again, Mr. McCarthy just alluded to, is some kind of fraud on the market theory that would be appropriate if we were talking about shareholders. We're not talking about shareholders; we're talking about parties who bargained at arm's length for the extension of credit by Lehman. And we don't think that would support a claim of fraud here.

And we are, Your Honor, very concerned that other parties -- other parties have and other parties will, if there's a precedent set here, use the examiner's report and the repo 105 allegations in a context in which they have no application.

So for that reason and the absolute failure to plead any nexus here, we think the fraud claim should be dismissed. And I think the other claims which are linked to it, in the ways described by counsel for the Turnberry parties, should also be dismissed.

Thank you.

THE COURT: Okay. Mr. Meister, you have more?

MR. MEISTER: Very, very briefly, Your Honor. Your Honor, responding to the committee, the nexus here is -- and the reason there isn't the fear, or I don't think there should be, Your Honor, the fear of this avalanche of litigation is if

we had a loan, just the ninety-five million dollar loan, you don't have this issue. The reason you have the issue is because there was a 625 million dollar term sheet that was never funded that would have taken out the 95 million dollar loan. Said differently, there would have been 530 million dollars of further funding under the 625 million dollar loan.

I don't see any reason why -- so the nexus is that we wouldn't have taken the ninety-five million dollar loan in the absence of having a fraudulently prepared understanding or an understanding pursuant to fraudulently prepared financial statements of Lehman's financial stability. We wouldn't have taken out the 95 million dollar loan because we would have known of their instability and would therefore have not relied on their ability to fund or promise a 625 million dollar loan. That's the nexus.

By the way, I don't understand counsel's remarks about the 10-Q and 10-K not appearing. They appear in paragraph 14 of the Fontainebleau -- it says the 10-K for 2007 and the 10-Q, so they certainly are alleged.

There was a statement made, which I don't understand at all, that Mr. Ersoff is affiliated with Turnberry. That is categorically untrue. He went to work -- I've forgotten now -- for another investment bank where my understanding is he works in a similar capacity to what he did for Lehman, and he has no connection whatsoever, disclosed, undisclosed to Turnberry.

THE COURT: Okay. I'm taking this under advisement but I'm going to make some comments that I hope will guide the parties, pending a formal adjudication, if one is needed.

When I first looked at the pleadings in preparation for the argument and discovered that there was certainly an overlap in the legal arguments and apparently an overlap through the principals with respect to the exposure going back and forth, my immediate reaction, particularly given the aging of the cases, was that some kind of alternative dispute resolution approach to this was probably overdue.

Mr. Meister made the comment toward the end of his principal argument that the parties have been engaged in substantive negotiations for some time, and without casting stones at Lehman, suggested that one of the problems has been a change in personnel responsible for the negotiations. It doesn't matter, frankly, what the cause may be for the failure to reach some kind of business understanding here.

The fact of the matter is that if we are spending the afternoon dealing with a motion to dismiss and if the parties are looking for a signal from the bench as to how certain issues that may be pivotal to these negotiations may be decided, I'm prepared to give some hints. I am not today dismissing the fraud claims, but based upon the argument that was presented, these claims are pitifully weak, and in all likelihood will be dismissed.

Based upon the argument that has been made by Mr. Meister, and I've listened to it with great care, the theory is so highly speculative as to probably not be consistent with the Iqbal standards of plausibility. For the parties to spend significant time and effort taking discovery as to what might have been in 2007 is a wasteful frolic and detour. The parties should deal with the reality of their discussions.

I see zero causation between the issues identified in the examiner's report and anything that actually happened or might plausibly have happened in June and July of 2007, based upon disclosure of such transactions. And this is a litigation tactic that presumably is designed to gain negotiating leverage for the developers. I'm not going to take away all of that leverage now, but I want you to know that you should count it at pretty close to zero.

As far as the remainder of the issues identified in the motion to dismiss, I'll give those arguments further thought as I consider a formal ruling, but I hope a formal ruling is not necessary. This has gone on far too long, and frankly, it's just about money. It is critical that litigation of this sort not clog my docket, and there is a whole portfolio of adversary proceeding litigation in the Lehman case that has been stayed so that parties can submit their disputes to alternative dispute resolution. While this is not litigation in the same category, it's certainly no more important than any

of that litigation, and in many respects, much simpler, both as to the facts and as to the amounts at issue.

If the parties are unable or unwilling to get to yes on their own, I strongly urge that the parties agree to mediation and do so promptly. This will be carried to the next adversary proceeding omnibus date, not for purposes of a ruling but for purposes of a status report from counsel as to what, if any, progress has been made in getting to a substantive resolution, and if no progress has been made, some indication as to a willingness to mediate. If there is no stated willingness to mediate I will order it.

We're adjourned until next time.

(Whereupon these proceedings were concluded at 3:53 PM)

I N D E X

RULINGS

C E R T I F I C A T I O N

I, Aliza Chodoff, certify that the foregoing transcript is a true and accurate record of the proceedings.

Aliza Chodoff

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